No. 78-1924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SUSAN D. GOLAND

and

PATRICIA B. SKIDMORE, *Petitioners,*

v.

CENTRAL INTELLIGENCE AGENCY, *et al., Respondents.*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

REPLY MEMORANDUM FOR PETITIONERS

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September 21, 1979

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The CIA's memorandum in opposition fails to rebut Petitioners' showing that this case poses important questions concerning the construction of and litigation procedures under the

Freedom of Information Act which should be, but have not yet been, definitively resolved by this Court.

I. THE CIA HAS FAILED TO REBUT PETITIONERS' SHOWING THAT THE "AGENCY RECORDS" ISSUE POSED BY THIS CASE COMPLEMENTS THE "AGENCY RECORD" ISSUES WHICH THIS COURT WILL REVIEW IN THE KISSINGER AND FORSHAM CASES

The CIA attempts to rebut Petitioners' showing (Pet. 16) that this case complements the "agency records" issues to be heard in Forsham v. Harris, No. 78-1118, and Kissinger v. Reporters Committee for Freedom of the Press, Nos. 78-1088 and 78-1217, by obscuring the fact that all three cases present the same basic issue -- whether "agency records" subject to the FOIA include those normally thought to be a party's records, i.e., those in its possession, custody or control. While it is true, as the CIA states (Memo. in Opp. 3), that in Forsham and Kissinger the agencies no longer possess the contested documents, while here the agency has possessed for 30 years a document allegedly controlled by Congress, this difference does not render the "agency records" issue here any narrower than the issue in Kissinger and Forsham.

Indeed, the fact situation here fleshes out the "agency record" definition issue presented by the other two cases. The Government here argues (Memo. in Opp. 2-3) that a document is not an "agency record" despite its 30 year possession by the CIA because it is under the "control" of Congress. In Forsham and Kissinger the Government is apparently arguing that documents are not subject to the FOIA, despite the agencies' alleged control over them, because they are not currently in the agencies' possession. The addition of this case to Kissinger and Forsham would force the Government to explain why alleged control is so crucial in this case while agency control in the other two cases must bow to current lack of possession.[1]

In addition, one of the Kissinger cases (No. 78-1217) raises the issue whether documents created in the White House Office of the President but later possessed by the State Department are

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[1] In its brief on the certiorari petitions in Kissinger, the Government apparently agreed with Petitioners in this case that the FOIA "requires the production of records in the agency's possession" (p. 6), and quoted with approval the statement in the 1967 Attorney General's memorandum on the FOIA that the Act refers to records "in the possession or control of an agency" (p. 7, emphasis added).

"agency records." See 48 U.S.L.W. 3069. This Kissinger issue is, of course, essentially similar to the "agency record" issue raised here.[2]

II. THE CIA HAS ESSENTIALLY CONCEDED THAT THIS CASE POSES THE IMPORTANT ISSUE WHETHER USUAL ADVERSARIAL LITIGATION PROCEDURES APPLY IN SO-CALLED NATIONAL SECURITY FOIA CASES

Contrary to the CIA's contentions (Memo. in Opp. 4), Petitioners' summary judgment issue poses a substantial question as to the proper litigation procedures in so-called "national security" FOIA cases. To be sure, the fact that the lower

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[2] Nor is there any "established case law" (Memo. in Opp. 2) foreclosing this issue. Neither case cited by the CIA (Memo. in Opp. 3) applies to records originated by Congress. Congress itself has not spoken to this issue. It has merely stated that it cannot be served with document requests under the FOIA. While Petitioners do not deny that Congress could provide a means for using agencies as repositories for its secret records, it clearly has not done so. Instead, it has provided in the FOIA that all agency records must be produced unless falling within the FOIA's nine specific exemptions. It provided no special definition of "agency records" in the Act to indicate that the Act does not apply the usual definition -- documents in an agency's possession, custody or control.

courts failed to adhere to proper summary judgment principles would not ordinarily merit this Court's review, as the Courts of Appeals can generally be relied upon to apply the settled principles of Rule 56. But as the CIA's memorandum concedes, this is not merely an aberrant case where the lower courts slipped up. Instead, this is one of a line of cases where Courts of Appeals, at the Government's behest, have consciously chosen to ignore accepted adversarial procedures in so-called "national security" cases, and resolved them solely on the basis of one-sided agency affidavits. See cases cited at Memo. in Opp. 4.

Such a marked departure from normal litigation procedures should not continue unreviewed by this Court. This case presents a vivid illustration why such procedures should not be permitted, and why the Courts of Appeals should be required to adhere to proper summary judgment principles. The affidavits accepted by the D.C. Circuit here claimed that all responsive documents had been identified when in fact over 320 responsive documents had been discovered by the CIA's librarian. (Pet. 58a-61a). Such incidents can be expected to recur if the Government can obtain automatic victory in these cases by simply filing affidavits which cannot be challenged in any way

by the other side. This case would require the Government to explain why so-called "national security" cases merit procedures which provide no realistic protection against the type of gross error perpetuated in this case.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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